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Supreme Court of the United States

October Term, 1971

MURRAY TILLMAN, *et al.*,

Petitioners,

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the Court held that a community recreation association could not claim immunity from the Civil Rights Act of 1866 on the ground that it was a private club, because it lacked a "plan or purpose of *exclusiveness*"

(emphasis added).[1] The Civil Rights Act of 1964 also incorporates the test of *exclusiveness* as the determinant of whether a facility meets the private club exemption of that statute (42 U.S.C., §2000(e)). Thus, Senator Humphrey, floor manager for the legislation, explained to the Senate that the exemption was intended to protect only "the genuine privacy of private clubs . . . whose membership is genuinely *selective*." (emphasis added) 110 Cong. Rec. 13697 (1964). Respondents herein, in their effort to avoid the precedent of *Sullivan* and to qualify for the private club exemption of the 1964 Act, seek to attribute to Wheaton-Haven a degree of exclusiveness which it does not have, and was never intended to have by anyone associated with its origins.

Contrary to respondents' assertion that Wheaton-Haven does not advertise its facilities or solicit membership, the record shows that in order to meet the requirement imposed by the Montgomery County zoning authority, that it submit evidence of having raised 60 percent of its projected construction costs, the promoters of Wheaton-Haven, during 1958, conducted an extensive membership campaign among families in the neighborhoods near the pool. As part of this campaign, a circular was prepared and distributed advertising the features and attractions of the recreational facility (A. 97, 99 (Admission No. 6)). Door-to-door solicitations were also conducted, the only qualification for charter membership in the association being the ability to

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[1] An informative discussion of the 1866 Act, published after Petitioners' opening brief herein was filed, is contained in Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 Geo. Wash. L. R. 1024 (July 1972).

then pay a minimum $20 pledge (Montgomery County br., p. 4a).[2] In addition, an open meeting for interested citizens was conducted by Wheaton-Haven's organizers in the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, a governmental agency (A. 97, 99 (Admission No. 7)). Finally, since Wheaton-Haven has frequent membership openings, it has customarily maintained a continuous solicitation for new members in the form of a large sign conspicuously posted at the pool premises bearing the telephone number of the membership chairman (A. 88, 92-93 (Admission Nos. 15, 16), Wheaton-Haven br., pp. 3, 10, Montgomery County br., p. 6a).

In order to qualify for a special zoning exception, Wheaton-Haven's promoters represented to Montgomery County

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[2] In the Appendix to its *amicus* brief (pp. 1a-14a), Montgomery county has included the official Opinion of its Commission on Human Relations in *Tillman, et al. v. Wheaton-Haven Recreation Association*, No. P.A. 6, June 3, 1969, 1 Race Rel. L. Survey 231 (1970), an administrative proceeding based on the same incidents of racial discrimination that are at issue in the case at bar. The Commission made numerous findings which directly refute any claim of exclusiveness by Wheaton-Haven. The truth of most of these findings is not in dispute, having been conceded by Wheaton-Haven in the instant proceeding (A. 96-99 (Admission Nos. 1, 2, 5, 6, 7, 8, 9, 10, 13, 14)). There is no merit, therefore, to Wheaton-Haven's present attempt (br., pp. 16-17) to discredit those findings. Although 3 months after the Montgomery County Commission entered its order against Wheaton-Haven, the public accommodations ordinance was held in another proceeding to be technically defective under state law because of its enactment in executive rather than legislative session (A. 143-160), the defect was cured by proper re-enactment of the identical ordinance on November 4, 1969 (Montgomery County br., pp. 18a-26a). The Commission's *Wheaton-Haven* opinion was part of the record before the Court of Appeals in the instant proceeding (Pet. App. B22-B23).

officials that the swimming pool would be open to everyone in the community, and would not be an exclusive social facility for the benefit of a few. Thus, in August 1958, in hearings before the County zoning authority on Wheaton-Haven's application for a special exception, its witnesses testified that the County had been unsuccessfully approached about building a municipal pool in the area (Montgomery County br., p. 4a). In lieu of a County facility, Wheaton-Haven's witnesses stated that the organization was attempting to serve the imperative recreational needs of the community, and that the pool was needed for youths as a deterrent to juvenile delinquency (*ibid.*). The zoning board was assured that the proposed pool would not be used for private social functions, but would be for the public benefit of the community at large (*ibid.*). Under the special zoning exception, authorization was given Wheaton-Haven "to permit the construction and use of a community swimming pool" (A. 85, 96 (Admission No. 1), Montgomery County br., p. 15a). This exception came within the new zoning category of "community swimming pool" which had been established by action of the Montgomery County Council on May 24, 1955 (A. 62).[3]

About the same time that Wheaton-Haven obtained zoning approval as a community swimming pool, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified at a hearing before the U.S. Senate Finance Committee concerning excise tax legislation affecting community pools.[4] He stated that community pools

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[3] See Petitioner's opening br., p. 6, n. 5.

[4] Hearings, July 15, 16 and 17, 1958, on H.R. 7125, Excise Tax Technical Changes Act, 85th Cong., 2nd Sess., pp. 166-167.

serve a significant recreational need in Montgomery County due to the failure of government to construct publicly-owned facilities. He asserted that such pools provide a healthy and constructive outlet for youth and are of general benefit to the public at large.. Finally, Mr. Rotkin said that community pools provide lower middle-income families with recreational opportunities that otherwise would not be available to them, and that such facilities are to be distinguished from private country clubs and their attendant social programs (Montgomery County br., p. 5a).

To concede to Wheaton-Haven – and inferentially similar community pools – the exclusiveness which it now claims, would be contrary to the purposes and expectations of its organizers, the community which it serves, and the Montgomery County government. The record shows clearly that the pool was organized and built on the basis of commitments that it would serve the community-at-large, and there is no justification for allowing those commitments to be dishonored at this time.

The manner of Wheaton-Haven's operation during the 11 years of its existence further confirms its non-exclusive character. The by-laws specify that membership is open to all residents of the three-quarter mile area surrounding the pool. Aside from this geographic qualification, there is no other requirement for membership, and the evidence reveals the rejection of only one applicant in the association's history.[5] The interviewing of applicants, which respondents rely on as evidence of the association's exclusive nature, was only instituted in 1964, and no social, formal

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[5] For all that appears, this person was rejected because of residence or race; there is no proof of either in the record. Little Hunting Park likewise had rejected one applicant in its history (A. 79).

or business background is obtained from these interviews, their sole purpose apparently being to observe the physical appearance of the applicant (Montgomery County br., pp. 5a-6a).

2. Respondents attempt to draw support for their position from *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), but there is no similarity between the Moose Lodge and Wheaton-Haven. As this Court pointed out, Moose Lodge was a local chapter of a "national fraternal organization having well-defined requirements for membership." 407 U.S. at 171. Fraternal organizations are by their nature exclusive, and hence the Moose constitution specifies that membership is restricted to "male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of any other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being." 407 U.S. at 181. Obviously, any person who does not meet any one of these qualifications is not eligible for membership in the Moose. Wheaton-Haven, by contrast, has no comparable indicia of exclusiveness, the only requirement for membership being geographic – that a person reside within the three-quarter mile radius of the pool.

Not only is this geographic requirement the sole qualification for membership stated in Wheaton-Haven's by-laws, but its articles of incorporation negate the existence of any general right to determine membership eligibility by applying a racial standard, or to make such determinations on the basis of the personal likes and dislikes of existing members. Thus, the articles of incorporation (Article VIII)[6]

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[6] The articles of incorporation are part of the record.

specifically state: "Conditions and qualifications of membership shall be fully set forth in the By-Laws." The by-laws make no mention of race as a qualification for membership; hence, reliance on this factor is in direct contravention of the corporate charter. Reliance on race as a qualification also violates the broader principle, recognized by respondents as the rule in Maryland (McIntyre br., p. 23, n. 18), that a voluntary organization's discretion in accepting or rejecting members is circumscribed by "its own constitution, charter, and by-laws." *Grempler v. Multiple Listing Bureau of Harford County*, 258 Md. 419, 266 A.2d 1, 4-5 (1970).

Furthermore, whatever discretion is possessed by Wheaton-Haven's directors and members in accepting or rejecting applicants is limited by the essential purpose for which the organization was formed. As we have seen, Wheaton-Haven's promoters, the public-at-large, and the Montgomery County government conceived this purpose to be the operation of a community swimming pool. For Wheaton-Haven now to bar from its facilities an entire class of residents of the community is a subversion of the corporate purpose, and to this extent is *ultra vires*. 19 Am. Jur. 2d, *Corporations* §963; and see, *Order of International Fraternal Alliance v. State*, 77 Md. 547, 26 Atl. 1040 (1893). It is mandatory that the discretion to approve or disapprove membership applicants be exercised in a manner consistent with the corporation's purpose, and that any applicant be admitted to membership who "possesses the qualifications prescribed by the constitution and by-laws of the association." *Porterfield v. Black Bill & Doney Parks Water Users' Ass'n*, 69 Ariz. 110, 210 P.2d 335, 338-339 (1949); *Meyers v. Lux*, 76 S. D. 182, 75 N.W. 2d 533, 536 (1956); *People v. Young Men's Father Mathew Total Abstinence Benevolent Society*, 41 Mich. 67, 1 N. W. 931, 933, 935 (1879).

3. Respondent McIntyre argues (br., p. 5) that Wheaton-Haven is beyond the ambit of the civil rights statutes because "it is member-controlled, member-financed and member-governed in every respect." This characterization, however, and the factors cited to support it were equally true of Little Hunting Park, the association at issue in the *Sullivan* case. The Court in that case held that such considerations do not determine the issue of statutory coverage. Rather, the question is whether the organization has a "plan or purpose of exclusiveness." *Sullivan*, 396 U.S. at 236. As we have seen, Wheaton-Haven has no such plan or purpose.

Finally, respondent McIntyre emphasizes the historic right of individuals in our system to choose their own associates, and asserts that to require Wheaton-Haven to comply with civil rights laws prohibiting racial discrimination would violate the "associational privacy" of Wheaton-Haven's members (br., pp. 20-25). The fallacy of this argument is that Wheaton-Haven was not founded upon an expectation of associational privacy, but rather upon the commitment that it would provide a community service available to residents of the surrounding geographic area. Consequently, membership was deliberately made open to everyone residing in that area.

Respondent's effort, therefore, to draw support from the historic principle of associational privacy does not aid Wheaton-Haven's position here. But even if one were to concede Wheaton-Haven the element of "privacy" which it claims, that does not automatically give it the right to determine membership eligibility on the basis of race, for even private associations are not as free from judicial supervision of their membership policies as respondent McIntyre would have it appear. Thus, courts with increasing

frequency in recent years have recognized that exclusion from a membership association may well mean far more to a person than hurt feelings. Rather, exclusion can have a definite adverse effect on one's property interests or economic well being. A good example is provided by the instant case where, as we have seen, access to the community swimming pool adds to the value of homes in the neighborhood which it serves, and the homeowner who is a Wheaton-Haven member obtains a specific asset – a first option which he can convey to the purchaser of his home, notwithstanding the existence of a membership waiting list. Wheaton-Haven, thus, through its membership policies, is in a position to significantly affect the property and economic interests of residents of the area where its recreation facilities are located, not to speak of the racial make-up of the neighborhood. Accordingly, Wheaton-Haven, at least, falls within that category of associations which, even though private, are not immune from judicial interference to remedy injury resulting from arbitrary or discriminatory exclusion. As the Maryland Court of Appeals has stated, "With the growth of private associations from rather informal beginnings to positions of real economic power, judicial erosion of the principle of non-interference began." *Grempler v. Multiple Listing Bureau of Harford County, supra*, 258 Md. 419, 266 A.2d at 5; and see, *Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650, 655-656 (C.A.D.C., 1970), cert. denied, 400 U.S. 965.

In the leading case of *Falcone v. Middlesex County Medical Society*, 34 N. J. 582, 170 A.2d 791 (1961), it was held that organizations, "'membership in which is an economic necessity' or 'those which are repositories of civic, civil or political rights,'" may not claim the right to arbitrarily exclude persons from membership as that enjoyed by purely

social or fraternal organizations.[7] The Court, in the *Falcone* case, held that a county medical society had unjustifiably denied membership to a qualified physician, and ordered that he be admitted. As justification for granting relief, the court emphasized, in terms equally applicable here, that the society,

> is not a private voluntary membership association with which the public has little or no concern. It is an association with which the public is highly concerned and which engages in activities vitally affecting the health and welfare of the people.[8]

Similarly, a union which is able to significantly affect employment opportunities and working conditions for workers in an industry may not resort to arbitrary or unreasonable membership practices, for "such a union occupies a quasi public position similar to that of a public service business. . . . It may no longer claim the same freedom

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[7] The Court distinguished *Trautwein v. Harbourt*, 40 N. J. Super. 247, 123 A.2d 30 (1956), relied on by respondent McIntyre (br., p. 23), which involved the membership policies of the Order of Eastern Star, a fraternal organization.

[8] Accord: *Blende v. Maricopa County Medical Society*, 96 Ariz. 240, 393 P.2d 926 (1964); *Pinsker v. Pacific Coast Society of Orthodontists*, 81 Cal. Rptr. 623, 460 P.2d 495 (1969); *Greisman v. Newcomb Hospital*, 40 N. J. 389, 192 A.2d 817 (1963); *Grempler v. Multiple Listing Bureau of Harford County*, *supra*, 258 Md. 419, 266 A.2d 1, 4-5; *Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools*, *supra*, 432 F.2d 650, 655-656; *Van Daele v. Vinci*, 5 Ill. 2d 389, 282 N.E. 2d 728 (1972); *Kurk v. Medical Society of the County of Queens*, 46 Misc. 2d 790, 260 N.Y.S. 2d 520 (1965), reversed on other grounds, 24 App. Div. 2d 897, 264 N.Y.S. 2d 859 (1965).

from restraint enjoyed by golf clubs or fraternal associations." *James v. Marinship Corporation*, 25 Cal. 2d 721, 155 P.2d 329, 335 (1944).[9] Likewise, in recognition of the important public function performed by utility cooperatives, courts have restrained them from exercising arbitrary powers over whom they will serve or admit to membership, notwithstanding their private ownership. See, *e.g.*, *Porterfield v. Black Bill & Doney Parks Water Users' Ass'n*, *supra*, 69 Ariz. 110, 210 P.2d 335; *Meyers v. Lux*, *supra*, 76 S. D. 182, 75 N.W. 2d 533. It is thus apparent that under modern common law principles an association which would traditionally be regarded as private may nevertheless

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[9] Accord: *Wilson v. Newspaper & Mail Deliverers' Union*, 123 N. J. Eq. 347, 350-351, 197 A. 720, 722 (1938); *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586, 165 P.2d 903 (1946); *Seligman v. Toledo Moving Pictures Operators Union*, 88 Ohio App. 137, 98 N.E. 2d 54 (1947); *Carroll v. Local 269, International Brotherhood of Electrical Workers*, 133 N. J. Eq. 144, 31 A.2d 223 (1943); *Cameron v. International Alliance of Theatrical Stage Employees*, 118 N. J. Eq. 11, 176 Atl. 692 (1935). Judicial intervention to assure fair and equitable membership practices does not depend on the union's having a closed shop agreement which enables it to exercise a monopoly over job opportunities. Rather, intervention stems from the fact that a union functions as "the medium for the exercise of industrial franchise. . . . The union, as a kind of public service institution, affords to its members the opportunity to record themselves upon all matters affecting their relationships with the employer." *Directors Guild of America v. Superior Court*, 48 Cal. Rptr. 710, 409 P.2d 934, 941 (1966); and see, *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831, 839 (1946); *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S. 2d 461 (1950).

possess sufficient quasi-public characteristics to warrant judicial supervision of its membership policies.

CONCLUSION

As shown herein and in petitioners' opening brief, no meritorious defense exists for ~~defendants'~~ respondents' acts of racial discrimination.[10] Accordingly, for the reasons stated by

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[10] The fact that respondent McIntyre's term as a director of Wheaton-Haven expired late in 1970 (while this case was under submission to the court of appeals) does not affect his possible liability for damages based on his participation in the discrimination against petitioners while he was a director in 1968. There is no support whatever in the record for the suggestion in his brief that he was voted out of office because he took an unpopular stand concerning the association's racial policy. On the contrary, despite his claim that he opposed that policy, and assertedly voted against it at membership meetings, the official minutes of the July 20, 1968 board of directors meeting at which the racially inspired guest policy was adopted show that he was present and voted for it (A. 41-42). Moreover, McIntyre continued to serve as a director for 2-1/2 more years after that policy was adopted, and from December 1969 to December 1970, he served as vice president of the association, in which capacity he participated in the administration and enforcement of the discriminatory policy which he had helped formulate (A. 102).

petitioners, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to remand to the district court for further appropriate proceedings.

Respectfully submitted,

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